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**GROUP 3600**

**BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES**

Application Number: 09/705,671  
Filing Date: November 03, 2000  
Appellant(s): MARTIN, DAVID

\_\_\_\_\_  
Stephen P. McNamara  
For Appellant

**EXAMINER'S ANSWER**

This is in response to the appeal brief filed August 23, 2005 appealing from the Office action mailed November 05, 2004.

**(1) *Real Party in Interest***

A statement identifying the real party in interest is contained in the brief.

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**(2) *Related Appeals and Interferences***

A statement identifying the related appeals and interferences which will directly affect or be directly affected by or have a bearing on the decision in the pending appeal is contained in the brief.

**(3) *Status of Claims***

The statement of the status of the claims contained in the brief is correct.

**(4) *Status of Amendments After Final***

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

**(5) *Summary of Claimed Subject Matter***

The summary of invention contained in the brief is correct.

**(6) *Grounds of Rejection to be Reviewed on Appeal***

The appellant's statement of the issues in the brief is correct.

**(7) *Claims Appendix***

The copy of the appealed claims contained in the Appendix to the brief is correct.

**(8) Evidence Relied Upon**

“How to establish quality control over the sales force” by Ed Roseman, Medical Marketing and media v27, n10, p.544(7) , Oct. 1992, Dialog File 148, record # 06199077.

“Selling” by Anonymous, Marketing Telemarketing Awards 1997 Supplement, pp 18-19, Jun 19, 1997, Dialog File 15, Record # 01444255.

“I want my MVT “: Drive marketing results with multivariate testing techniques” by Bell, Gordon H., Dialog File 15, record #01549882.

**(9) Grounds of Rejection**

The following ground(s) of rejection are applicable to the appealed claims:

**7. Claims 1, 5-9,13-15,19,23 are rejected under 35 U.S.C. 103(a) as being unpatentable over “How to establish quality control over the sales force” by Ed Roseman, Medical Marketing and media v27, n10, p.544(7) , Oct. 1992, Dialog File 148, record # 06199077, hereinafter Roseman, in view of “Selling” by Anonymous, Marketing Telemarketing Awards 1997 Supplement, pp 18-19, Jun 19, 1997, Dialog File 15, Record # 01444255, hereinafter Anonymous.**

As to claim 1 Roseman discloses

A method of determining effectiveness of direct personal promotion efforts in a marketing environment in which representatives make contact with a customer in accordance with a prioritized list, comprising the steps of:

a) creating a prioritized list of customers for representatives of an

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organization to use in contacting customers, said prioritized list including an identification of a customer identity and a specified contact frequency for each such customer to be executed by said representatives (page 1, 5<sup>th</sup> full paragraph  
: docs are ranked, i.e. identification of each is implied ; then specific call frequencies are assigned to them)

Roseman does not specifically disclose but Anonymous , at page 2, 2<sup>nd</sup> to 9<sup>th</sup> paragraphs, does disclose

b) adjusting a specified contact frequency for a selected subset of customers (the 20,000 smaller customers out of all customers) to create an adjusted prioritized list ( adjusting the contact frequency from zero contact to some contact, p. 2, 7<sup>th</sup> paragraph);

c) communicating said adjusted prioritized list to said representatives (this is implied) ;

d) measuring changes (interpreted as measured against a control group) in the promotional response among said selected subset of customers( p. 2, 9<sup>th</sup> paragraph: measure 27.9% more as against a control group of the 20,000 smaller customers subset).

It would have been obvious to one skilled in the art at the time the invention was made to add Anonymous's method of adjusting contact frequency for a small group and test measured responses changes as against a control group to Roseman's prioritized list to determine whether changing call frequencies increase sales as a step toward determining optimum call frequencies (Roseman p. 2, 4<sup>th</sup> paragraph) and in the process to identify the better leads (Roseman, at page 2, 1<sup>st</sup> to 6<sup>th</sup> paragraphs, discloses "constantly fine-tuning the physician selection").

As to claims 6-7 (dependent on claim 1) and independent claims 9, 15,19, neither Anonymous or Roseman specifically discloses

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“using a measured change (increase) in promotional response among said selected subset of customers as an input to creation of an updated prioritized list specifying a modified contact frequency for certain ( or one or more first target group of ) customers”,

However, Anonymous discloses a measured change (increase) (29.7% increase) in promotional response among a selected subset of customers. Implicit in Anonymous’s change measure is the identification of the better respondents.

On the other hand, Roseman discloses monitoring and fine tuning of doctor targets i.e. of the prioritized list. Roseman further discloses better responding doctors get higher call frequencies (page 1, 10<sup>th</sup> paragraph) .

It would have been obvious to one skilled in the art at the time the invention was made, in view of the explicit teachings of both references as stated above, to add Anonymous to Roseman and have the claimed “using a measured change (increase) in promotional response among said selected subset of customers as an input to creation of an updated prioritized list specifying a modified contact frequency for certain customers (claim 6) or for or one or more first target group of customers most likely to generate additional sales in response to a increased contact frequency.(claims 7 and 9).

In other words, once a positive response has been determined in response to an increase in contact frequency (such as 29.7% as taught by Anonymous) and implicitly the better respondents identified, it would have been obvious to one skilled in the art at the time the invention was made, in view of Roseman’s teaching that docs who respond well to calls (“customers most likely to generate additional sales in response to a increased contact frequency”) get higher call frequencies, to use that data of higher response to calls (such as 29.7% as taught by Anonymous) as an input to further identify the higher potential doctors and to modify (increase) the call frequency to that group of positively responding customers (doctors), thereby creating a “updated prioritized list specifying a modified contact frequency”, to those identified customers, to potentially improve ROTI ( return on time invested) as taught by Roseman (p. 2 , 4<sup>th</sup> paragraph).

Claim 15 essentially parallels claim 9 in software format and is rejected on the same basis (Roseman's optimization page 2, 4<sup>th</sup> paragraph suggests the use of computers and software).

Claim 19 essentially parallels claim 9 with the addition of communication the updated prioritized list to pharmaceuticals representatives, which would have been obvious in order to carry out the modified sales campaign.

As to claims 5, 13 (dependent on claims 1 and 9 respectively),  
monitoring of actual contacts with customers is taught by Roseman at p. 1, 9<sup>th</sup> paragraph, thus "measuring changes in actual contacts by said representatives with said selected subset of customers" in the Roseman/Anonymous system would have been obvious to one skilled in the art at the time the invention was made to be able to measure the changes taught by Anonymous and thereby effect the Roseman/Anonymous method.

As to claims 8, 14, 23 (dependent on claims 1, 9, 19 respectively) neither Anonymous or Roseman specifically discloses

using a measured decrease (change) in promotional response among said selected subset (one or more second target groups) of customers as an input to creation of an updated prioritized list with a modified contact frequency decreasing contact frequency with customers whose promotional response is least affected by a decrease in contact frequency.

However, if the response measured is negative when applied to a (second or subset) group of doctors, it would have been obvious to one skilled in the art at the time the invention was made, to identify that group of doctors as low-responding and in view of Roseman's teaching that lower responding docs get lower call frequency (p. 1 8<sup>th</sup> paragraph), the lower measured response thus would have been used as an input to the "creation of an updated prioritized list with a modified (decreased) contact frequency applicable to customers contained

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in said one or more second target groups of customers” and “whose promotional response is least affected by a decrease in contact frequency”

to better focus sales efforts as taught by Roseman (page 1, 9<sup>th</sup> paragraph; page 2, 1<sup>st</sup> paragraph) by spending less time with the low potential customers.

**7. Claims 2-4, 10-12, 16-18, 20-22 are rejected under 35 U.S.C. 103(a) as being unpatentable over Roseman, in view of Anonymous and further in view of “I want my MVT “: Drive marketing results with multivariate testing techniques” by Bell, Gordon H., Dialog File 15, record #01549882, herereinafter Bell.**

As to claims 2-4, neither Roseman nor Anonymous specifically disclose the step b) of adjusting the specified contact frequency comprises increasing (claim 2) or decreasing (claim 3) a quantity of contacts made with a group of identified customers in a specified time period or increasing a quantity of contacts made with a first group of identified customers and decreasing a quantity of contacts made with a second group of identified customers (claim 4)

However Bell discloses a method for testing, in the market place, several ideas at the same time on different subgroups, measuring the results from each test on each group then rolling out the best idea to the whole group later (see page 2-3). At page 3, 7<sup>th</sup> paragraph, Bell further teaches modifying calls frequency (decreasing calls frequency from one week to 4 weeks apart) and measuring the effect of such change (“helped”), inherently using data covering two periods of the same length).

It would have been obvious to one skilled in the art at the time the invention was made to add the Bell MVT test and measure technique as applied to call frequencies to the prioritized list based on call frequency system of Roseman/Anonymous effectively to test and measure the marketplace effect of several ideas (different call frequencies) such as taught by Bell.



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As to claims 2 and 3, it to use an increasing or decreasing frequency (as applied to one subgroup and test against another control group) as a test parameter when finding an optimum frequency as taught by Roseman ( P. 2 4<sup>th</sup> paragraph).

As to claim 4, testing both increasing and decreasing frequencies is, as stated above, effectively to test and measure the marketplace effect of several ideas (different call frequencies) quickly, as taught by Bell.

As to claims 10-12, 16-18, 20-22 (dependent on claims 9, 15, 19 respectively) , they parallel claims 2-4 and are rejected on the same basis.

**The following Response to argument was also included in the last Office Action (Office Action pages 3-4) and is integral to the above rejection :**

“Applicant's arguments have been fully considered but they are not persuasive.

First, Applicants argue at page 12 1<sup>st</sup> full paragraph that Roseman does not disclose any systems for testing promotion response by alteration of call frequency, however R Roseman is used in a 35 USC 103 rejection and does not need to disclose such.

Then, Applicants argue P. 12 2<sup>nd</sup> full paragraph: “Anonymous does not disclose any systems for testing promotion response by alteration of call frequency using a specified contact frequency that is adjusted to provide an input to a sales staff to follow.” However, Anonymous does read on testing promotion response by alteration of call frequency while Roseman discloses a system using a specified contact frequency that is adjusted to provide an input to a sales staff to follow. Thus the combination Anonymous/ Roseman duly discloses a system as claimed as explained in the body of the rejection.

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The PTO can satisfy the burden under section 103 to establish a prima facie case of obviousness “by showing some objective teaching in the prior art ... would lead that individual to combine the relevant teachings of the references.”

In re Fine, 5 USPQ2d 1596 (CA FC 1988)

“To support conclusion that claimed combination is directed to obvious subject matter, references must either expressly or impliedly suggest claimed combination or examiner must present convincing line of reasoning as to why artisan would have found claimed invention to have been obvious in light of references' teachings.” Ex parte Clapp, 227 USPQ 972 (BdPatApp&Int 1985). Here, the examiner has presented a convincing line of reasoning as to why artisan would have found claimed invention to have been obvious in light of references' teachings.

Contrary to Applicants' arguments that Anonymous discloses only “we got sales by calling on all the people we hadn't called on before”, Anonymous does disclose “ testing promotion response to changes in call frequency “ and stands for the quantification of effort and result of contacts. Further Roseman discloses a system where a sale force makes prioritized calls while searching to maximize the best call frequency. Roseman implies that call frequency was adjusted, see “sales response...peak at 6 calls, decline thereafter”. Thus Roseman implies different frequencies were tested for doctors. Also Roseman calls for “post call analysis” to determine the effects and to see if the number of calls is proper.

To Applicants' Arguments, at p. 13 last paragraph, citing 3 unique characteristics of the claimed method the Examiner note that none of the three characteristics is reflected in the claims. It cannot be said from the claims that the method is either 1) indirect and easier to use as argued,

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or 2) that the experiment does not distort the results or 3) that the method randomizes which customers get the decreases/increases thereby allowing to test the responses of subgroups.

Contrary to Applicants' arguments at p. 12 and 13, the claims do not clearly claim "testing promotion response by alteration of call frequency" "in a system where the sales force alters a planned selling cycle" and thus the cited references do not need to meet exactly the language argued.

Also it is not claimed that the promotional response is to be determined within the various subgroups of customers as argued at p. 13, lines 1-3.

On page 13, full 2<sup>nd</sup> and 3<sup>rd</sup> paragraphs, Applicants further argue details that are either irrelevant or not specifically claimed, such as "without regard to content" , "where a fixed script is employed" , "randomization of customers"... etc...

Thus the original rejections are maintained. The following is a repeat of the last Office Action."

***(11) Response to Argument***

**I. First, as to the Rejection of claims 1, 5-9, 13-15, 19, and 23 under 35 U.S.C. § 103(a) over Roseman in view of Anonymous, Appellants argue improper hindsight. ( Brief at page 2).**

**A. Preliminary Remarks:**

Applicants repeatedly challenge the above applied rejection under 35 U.S.C. § 103(a), because it is argued the prior art, both Roseman and Anonymous, does not involve a situation of

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“testing promotion response in response to call frequency within a system where the sales force alters a planned selling cycle by introducing variables due to their biases or knowledge” (see Brief, page 13, full 4<sup>th</sup> paragraph to page 14; page 14, 2<sup>nd</sup> full paragraph; page 15, end of full 2<sup>nd</sup> paragraph; page 18, 4<sup>th</sup> paragraph).

However, the primary reference, Roseman, involves exactly the same marketing environment involving “prioritized lists” that is the subject of the instant application.

Roseman involves a system of medical sales representatives making calls on doctors. Doctors names to be called on are identified, and ranked, and call frequencies are set, based on the rankings. Applicants at least agree that Roseman discloses that much (Brief page 13, 1<sup>st</sup> full paragraph).

Thus, marketing according to a “prioritized list”, as defined by the Specifications at page 2 lines 19-25, and the independent claims, is involved in ROSEMAN.

Roseman does not explicitly state that “the sales force alters a planned selling cycle by introducing variables due to their biases or knowledge”. However it is admitted in the Specifications at page 4, 1<sup>st</sup> paragraph, that sales forces which make calls according to such prioritized lists, often do not follow them exactly. Thus, contrary to argument, Roseman’s medical sales force, operating with prioritized lists, exactly as the sales force of the instant application, implicitly also can “alter a planned selling cycle by introducing variables due to their biases or knowledge”.

As to Anonymous, Applicants repeatedly argue the same, that this reference does not disclose a sales force which can “alter a planned selling cycle by introducing variables due to their biases or knowledge” (see Brief, page 13, full 2<sup>nd</sup>, 4<sup>th</sup> paragraphs to page 14 first paragraph; page 15, end of full 2<sup>nd</sup> paragraph; page 18, 4<sup>th</sup> paragraph).

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However Anonymous, as a secondary reference in a 35 U.S.C. § 103(a) combination, does not need to disclose such, since the primary reference, Roseman, already discloses such, as stated above.

Further, it must be emphasized that all this language of “the sales force alters a planned selling cycle by introducing variables due to their biases or knowledge”, or as later argued, similar language, is not claimed and therefore, **Applicants had repeatedly, but unconvincingly, argued that which is not claimed.**

**B. The ROSEMAN reference and whether it discloses testing promotion response by alteration of call frequency:**

Next, Applicants argue Roseman does not disclose any systems for testing promotion response by alteration of call frequency (Brief page 13, 1<sup>st</sup> full paragraph).

Contrary to argument, Roseman does disclose a system for measuring promotion response by alteration of call frequency.

Roseman discloses a system where a sale force makes prioritized calls (page 1, 5<sup>th</sup> and 9<sup>th</sup> full paragraphs) while searching to optimize call patterns i.e. to find the best call frequency that generates the best sales return (page 2, 4<sup>th</sup> full paragraph: sales responses are researched per product type and for a particular product, “the sales response curve tends to peak at about six calls annually..”; page 2, 1<sup>st</sup> paragraph: “we haven’t maxed out with respect to the number of calls we make on the target physicians”).

Roseman further states that call frequency is primarily based on work load but that belief should be challenged and “post call analysis” should be conducted to determine the effects

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of the calls ” ( see page 2, 2<sup>nd</sup>-3<sup>rd</sup> full paragraphs) i.e. to see if the number of calls per doctor is proper. Again this shows that in Roseman, different calls frequencies for the doctors are tested.

Further, Roseman clearly implies that promotions responses are measured and graphed against such frequencies, to obtain a sales response curve and from there to find the optimum call frequency (see “sales response curve tends to peak at 6 calls annually and tended to decline thereafter”, page 2, 4<sup>th</sup> full paragraph).

Thus, Roseman does disclose a system for measuring promotion response ( the “sales response curve”) by alteration of call frequency.

Thus, as to the independent claims, as stated during prosecution, Roseman discloses:

A method of determining effectiveness of direct personal promotion efforts in a marketing environment in which representatives make contact with a customer in accordance with a prioritized list, comprising the steps of:

a) creating a prioritized list of customers for representatives of an organization to use in contacting customers, said prioritized list including an identification of a customer identity and a specified contact frequency for each such customer to be executed by said representatives (page 1, 5<sup>th</sup> full paragraph: docs are ranked, i.e. identification of each is implied; then specific call frequencies are assigned to them).

Further, it is now emphasized, Roseman also discloses step d)

d) measuring changes in the promotional response ( the “sales response curve” implies the promotional response is plotted against frequencies) and recording data relating to said changes (as a function of changing frequencies).

**C. The ANONYMOUS reference:**

Other than the arguments as to ANONYMOUS addressed in the Preliminary Remarks, Applicants argue that all that ANONYMOUS reveals is that sales will increase when salesmen begin to call on customers.

However, contrary to argument, ANONYMOUS also reads on measuring promotion response (29.7%) by alteration of call frequency (from zero to a certain frequency) using a specified contact frequency ( the original frequency of zero) that is adjusted (to some frequency) to provide an input to a sales staff ( so that the staff can carry out the calls according to the modified frequencies).

Next, at page 13, full 3<sup>rd</sup> paragraph of the Brief, Applicants argue that the Examiner cannot equate the group of 20,000 previously uncalled customers in ANONYMOUS out of a total of 45,000 customer accounts to a "selected subset of customers." Applicants argue that "what the claim calls for is making adjustments in the frequency of sales calls in a small group of customers, identified as a "selected subset", not a group making up almost half the customer accounts."

This is unpersuasive. It is noted that nothing in the claim language requires such a reading of a small group of customers which must be smaller than half the customers total, or less than 20,000 accounts.

Appellants have not explained how the claim language requires a limited reading as argued when it is well settled that claims must be given the broadest reasonable interpretation during prosecution.

During patent examination, the pending claims must be given the broadest reasonable interpretation consistent with the specification. Reading a claim in light of the specification, to

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thereby interpret limitations explicitly recited in the claim, is quite different from reading limitations of the specification into a claim, to thereby narrow the scope of the claim by implicitly adding disclosed limitations which have no express basis in the claim. *In re Prater*, 162 USPQ 541 (CCPA 1969). Although claims are interpreted in light of the specification, limitations from the specification are not read into the claims. *In re Van Geuns*, 26 USPQ2d 1057 (CA FC 1993).

Thus Anonymous properly reads on steps b) to d) of claim 1 as presented during prosecution and more in details below.

Next, at the start of page 14 of the Brief, Applicants again argue Anonymous involves tight control of the marketing effort unlike “the environment contemplated by the present invention in which a sales force with independent biases can alter the selling program.” **Again it is noted the claims language do not preclude control of the marketing effort.** Further Roseman, already discloses medical sales forces, which can alter call frequencies (see preliminary remarks above).

Continuing, at page 14, first full paragraph of the Brief, Appellants argue Anonymous, involving direct control of total calls , “cannot determine promotional response within the various subgroups of customers that were called on”.

**It is noted Appellants again argue what is not claimed.** Determining” promotional response within *the various subgroups* (emphasis added) of customers” is not claimed in independent method claims 1 and 9. Claim 1 claims only measuring and recording changes in the promotional response among said selected *subset (singular, emphasis added)* of customers. Claim 9 claims only “using a measured change in promotional response among said selected subset (*singular, emphasis added*) of customers as an input to creation of an updated electronic prioritized list...” thus the use of ANONYMOUS in the instant rejection is totally appropriate for both claims.



Then, at page 14, 2<sup>nd</sup> full paragraph of the Brief, Appellant argue that the invention set forth in the claims has three unique characteristics that are not disclosed, taught or suggested by Anonymous.

The first alleged characteristic is that it is "indirect" - it works through suggested calls, not actual calls - thus it is possible to implement in loose systems in which the salesmen have the potential to not follow the directions they are given. It is argued the system of Anonymous would not work in this environment.

In answer, it is noted that ANONYMOUS is used in combination with Roseman which involves the same marketing to doctors according to a prioritized list, implicitly "in loose systems in which the salesmen have the potential to not follow the directions they are given", just as in the present application (see Preliminary Remarks). Applicants have not shown why ANONYMOUS would not be compatible with Roseman.

The second alleged characteristic is that it is less obvious which customers get increased numbers of calls (or decreased numbers of calls), so the method itself does not distort the results. Appellant attack Anonymous as a method involved beginning calls to nearly 50% of the customer base thus creating effects that are in addition to the factors intended to be measured.

In answer, it is noted that nothing in the claims require no distortion of the results, or avoidance of certain effects, nor that the method should be not obvious as to which customers get increased or decreased number of calls. **Again Appellants argue that which is not claimed.** Some aspects of Appellants' testing methodology, as disclosed in the Specifications may be patentable, but as presently drafted, the claim language is so broad as to read on many measuring methods and systems, and Roseman in view of ANONYMOUS properly read on the present claims.

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Further, Anonymous as a secondary reference stands for the larger teaching of using a subset of a set as a more limited test sample, in the context of measuring sales response as a function of changing frequency, which is the same context as in ROSEMAN. Contrary to argument, the sample size of roughly 50% of the customer base is not the teaching relied upon in formulating the present rejection, and therefore is irrelevant here.

Anonymous further, implicitly, stands for the identification of the better prospects. Such identification is also a goal sought in ROSEMAN, as stated above. Thus Anonymous and ROSEMAN are analogous arts and Applicants have not convincingly demonstrated how using ANONYMOUS as proposed is incompatible with ROSEMAN.

The third alleged characteristic is that the method randomizes which customers get the increases/decreases, which allows the marketer to test the promotional response of subgroups.

**Again, Appellants argue that which is not claimed.** Nothing in the claims require a reading of randomization of customers.

Next, at page 15 of the Brief, Appellants argue that Claim 1 specifies "a marketing environment in which representatives make contact with a customer in accordance with a prioritized list." and that this claim language is intended to mean that the customers are being called on by salespersons such as pharmaceutical sales representatives and not by a simple telemarketing call center.

It is noted again Roseman involves exactly such marketing environment.

Further assuming Applicants are correct that Anonymous involves only calls made "by a simple telemarketing call center", nothing in this language precludes calling by a telemarketing call center. **Again, Appellants argue that which is not claimed.**

Again in arguing that the disclosures of ANONYMOUS “do not provide any direction on how to design a method of testing promotion response as provided in the detailed discussion of the invention in the specification in a situation where the call frequency and the call content is not controllable to an exact degree”, (Brief, page 15 full 2nd paragraph), Applicants argue that which is not claimed as stated above (see Preliminary Remarks).

Then, as to the argument that the combination of ANONYMOUS and ROSEMAN is not obvious (Brief, page 15 full 3<sup>rd</sup> paragraph), during prosecution it had been stated that, as to claim 1,

*“Anonymous , at page 2, 2<sup>nd</sup> to 9<sup>th</sup> paragraphs, does disclose*

*b) adjusting a specified contact frequency for a selected subset of customers (the 20,000 smaller customers out of all customers) to create an adjusted prioritized list ( adjusting the contact frequency from zero contact to some contact, p. 2, 7<sup>th</sup> paragraph; it is implied the customers identities are known);*

*c) communicating said adjusted prioritized list to said representatives (this is implied) ;*

*d) measuring changes (interpreted as measured against a control group) in the promotional response among said selected subset of customers( p. 2, 9<sup>th</sup> paragraph: measure 27.9% more as against a control group of the 20,000 smaller customers subset that were not contacted i.e. with a call frequency of 0).*

*It would have been obvious to one skilled in the art at the time the invention was made to add Anonymous's method of adjusting contact frequency for a small group and test measured responses changes as against a control group to Roseman's prioritized list to determine whether changing call frequencies increase sales as a step toward determining optimum call frequencies (Roseman p. 2, 4<sup>th</sup> paragraph) and in the process to identify the better leads*

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*(Roseman, at page 2, 1<sup>st</sup> to 6<sup>th</sup> paragraphs, discloses "constantly fine-tuning the physician selection")." ( see Office Action mailed 11/05/2004, page 6.*

Another reason to combine Anonymous to Roseman is as follows.

Roseman teaches determination of optimum call frequencies by variation of frequencies without specifying the customers test sample size used .

(As discussed above, Roseman does disclose a system where a sale force makes prioritized calls while searching to maximize the best call frequency. Roseman implies that different frequencies were tested for doctors and promotion responses are measured (a response curve is obtained) in response to changes in call frequency.)

However, ANONYMOUS teaches increase of sales response as a function of increased call frequency and also discloses use of a smaller group of customers as a test sample. It would have been obvious to one skilled in the art at the time the invention was made to use Anonymous smaller test sample and sales-response/frequency test methodology in ROSEMAN's larger group of customers to limit the test size and thereby more easily determine the optimum call frequency, a goal sought in ROSEMAN, and in the process also identify the better leads, another goal sought in ROSEMAN, since the smaller test sample would more easily allow such identification.

Thus, contrary to argument, Anonymous does disclose an system for measuring promotion response by alteration of call frequency using a specified contact frequency that is adjusted . Further, the combined system of Roseman in view of ANONYMOUS does disclose an system for measuring promotion response by alteration of call frequency using a specified contact frequency that is adjusted in an environment where a sales staff may - or may not - follow the specified contact list.

Thus the prior art, as applied, does disclose all aspects of the claimed invention.

**D. Claims 5 and 13:**

Applicants next challenge the rejection of claims 5 and 13. Applicants state that claims 5 and 13 “specify methods of measuring promotion response which tests the actual calling frequency by salespersons *triggered by changes in suggested call lists given to salesperson (emphasis added)* ”, is neither disclosed by nor suggested by the cited references. **The Examiner notes that the italicized language is not claimed.** Claims 5 and 13 only claim measuring changes in actual contacts by salespersons with the selected subset of customers. Both ROSEMAN and ANONYMOUS disclose monitoring changes in actual contacts by salespersons. ANONYMOUS further discloses measuring changes in actual contacts by salespersons as to a subset of customers.

Indeed, as to claims 5, 13

monitoring of actual contacts with customers is taught by Roseman at p. 1, 9<sup>th</sup> paragraph. Further Roseman implicitly teaches graphing promotion response as a function of changing frequencies as discussed above. However Roseman does not specifically disclose measuring changes in the actual contacts, though it would have been desirable, from such a graph, to “measure changes in actual contacts (or frequencies)” to compare with a change in the promotion response and thereby study the respective correlation. Roseman does not specifically disclose such measurement in the actual contacts is done with a particular subset of customers either.

However ANONYMOUS also teaches monitoring actual contacts or frequencies (e.g. from zero to a certain number of calls per customer) as applied to a subset of customers. ANONYMOUS also implicitly measures a change in actual contacts (from zero to a certain number of calls) in order to correlate with the measured promotion response (27.9%). Thus it would have been obvious to one skilled in the art at the time the invention was made to add the

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method of measuring changes in actual contacts as disclosed in ANONYMOUS to the ROSEMAN's monitoring of actual contacts method as discussed above, to allow such desirable correlating of promotion response to actual contacts changes, as discussed above.

Further, by applying that method, on a smaller subset of customers as test sample, as taught in ANONYMOUS, testing the promotion response in ROSEMAN would have been made more efficient and therefore obvious to be done by one skilled in the art.

**E. Claim 23:**

Next Applicants challenge the rejection of claim 23 .

However, during prosecution , it had been stated:

“As to claims 8, 14, 23 (dependent on claims 1, 9, 19 respectively) neither Anonymous or Roseman specifically discloses using a measured decrease (change) in promotional response among said selected subset (one or more second target groups) of customers as an input to creation of an updated prioritized list with a modified contact frequency decreasing contact frequency with customers whose promotional response is least affected by a decrease in contact frequency.

However, if the response measured is negative when applied to a (second or subset )group of doctors, it would have been obvious to one skilled in the art at the time the invention was made, to identify that group of doctors as low-responding and in view of Roseman's teaching that lower responding docs get lower call frequency (p. 1 8<sup>th</sup> paragraph) , the lower measured response thus would have been used as an input to the “creation of an updated prioritized list with a modified (decreased) contact frequency applicable to customers contained in said one or more second target groups of customers” and “whose promotional response is least affected by a decrease in contact frequency”

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to better focus sales efforts as taught by Roseman (page 1, 9<sup>th</sup> paragraph; page 2, 1<sup>st</sup> paragraph) by spending less time with the low potential customers. “

**F. The legal test for rejections under 35 USC 103(a):**

At page 15 full 2<sup>nd</sup> paragraph of the Brief, Appellants argue the standard of anticipation should be applied to the combination of ROSEMAN in view of ANONYMOUS. Such is not the legal test under 35 USC 103(a).

The PTO can satisfy the burden under section 103 to establish a prima facie case of obviousness “by showing some objective teaching in the prior art ... would lead that individual to combine the relevant teachings of the references.”

*In re Fine*, 5 USPQ2d 1596 (CA FC 1988)

“To support conclusion that claimed combination is directed to obvious subject matter, references must either expressly or impliedly suggest claimed combination or examiner must present convincing line of reasoning as to why artisan would have found claimed invention to have been obvious in light of references' teachings.” *Ex parte Clapp*, 227 USPQ 972 (BdPatApp&Int 1985).

Here, as discussed in detail above, the examiner has presented a convincing line of reasoning as to why a skilled in the art would have found claimed invention to have been obvious in light of references' teachings.

Accordingly, the rejection of claims 1, 5-9, 13-15, 19, and 23 as unpatentable over Roseman in view of Anonymous should be sustained.

**II. Rejection of claims 2-4, 10-12, 16-18, and 20-22 under 35 U.S.C. §103(a) over Roseman in view of Anonymous and further in view of Bell.**

As to Bell, Applicants agree Bell discusses the concept of multivariable testing but again argues that Bell involves a telemarketing call center in which the company has complete control over the content and timing of its sales calls. Again, contrary to argument, it is noted that ROSEMAN, then main reference, already discloses “a sales environment where salesmen may alter call frequency either intentionally or unintentionally”, and thus Bell, a secondary reference, does not need to teach the same limitation. Again, it is noted this limitation is not even claimed.

**Further, contrary to argument, nothing in the claims explicitly rules out calls by telemarketing call centers, even if Applicants are correct Bell involves those only.**

Applicants then challenge that Bell does not teach modification of call frequency with the example in Bell in which a mailing of informational material was followed up by a telephone call, and the timing of the telephone call was changed from one week after the mailing to four weeks after the mailing. Contrary to argument, in Bell, implicitly the original call frequency is one call in a week after sending out the catalog. The new frequency is less because it is one call per 4 weeks. Thus Bell specifically disclose decreasing the "quantity of contacts made ... in a specified time period" as specified in claims 2-4, the specified time period implicitly being one week.

Applicants further challenge that Bell does not disclose testing promotion response by alteration of call frequency using a specified contact frequency that is adjusted to provide an input to a sales staff. Again, ROSEMAN, the main reference, already discloses such, and thus Bell, a secondary reference, does not need to teach the same limitation.

**A. Claims 2, 10, 16, and 20:**



As to claims 2-4, neither Roseman nor Anonymous specifically disclose the step b) of adjusting the specified contact frequency comprises increasing a quantity of contacts made with a group of identified customers in a specified time period.

However Bell discloses a method for testing, in the market place, several ideas at the same time on different subgroups, measuring the results from each test on each group then rolling out the best idea to the whole group later (see page 2-3). At page 3, 7<sup>th</sup> paragraph, Bell further teaches modifying calls frequency (decreasing calls frequency from one week to 4 weeks apart) and measuring the effect of such change (“helped”), (inherently using data covering two periods of the same length).

It would have been obvious to one skilled in the art at the time the invention was made to add the Bell MVT test and measure technique, as applied to call frequencies, to the prioritized list - based on call frequency - system of Roseman/Anonymous efficiently and quickly to test and measure the marketplace effect of several call frequencies (different ideas). The efficiency advantage of the MVT method is taught by Bell.

As to claim 2 and its parallels, it would have been obvious to use an increasing frequency (as applied to one subgroup and test against another control group) as a test parameter, to further the process of looking for an optimum frequency as taught by Roseman ( P. 2 4<sup>th</sup> paragraph).

**B. Claims 3, 11, 17, and 21;**

Applicants next challenge the rejections of claims 3, 11, 17, and 21 (Brief, p. 17 , full 3<sup>rd</sup> paragraph).

As to these claims, neither Roseman nor Anonymous specifically disclose the step b) of adjusting the specified contact frequency comprises decreasing a quantity of contacts made with a group of identified customers in a specified time period.

However Bell discloses a method for testing, in the market place, several ideas at the same time on different subgroups, measuring the results from each test on each group then rolling out the best idea to the whole group later (see page 2-3). At page 3, 7<sup>th</sup> paragraph, Bell further teaches modifying calls frequency (decreasing calls frequency from one week to 4 weeks apart) and measuring the effect of such change (“helped”), (inherently using data covering two periods of the same length).

It would have been obvious to one skilled in the art at the time the invention was made to add the Bell MVT test and measure technique, as applied to call frequencies, to the prioritized list - based on call frequency - system of Roseman/Anonymous efficiently and quickly to test and measure the marketplace effect of several call frequencies (different ideas). The efficiency advantage of the MVT method is taught by Bell.

As to claims 3 and its parallels, it would have been obvious to use a decreasing frequency (as applied to one subgroup and test against another control group) as a test parameter, to further the process of looking for an optimum frequency as taught by Roseman ( P. 2 4<sup>th</sup> paragraph).

**C. Claims 4, 12, 18, and 22:**

Applicants next challenge the rejections of claims 4, 12, 18, and 22 (Brief, p. 17 , full 4th paragraph).

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As to claim 4, and its parallels, neither Roseman nor Anonymous specifically disclose the step b) of increasing a quantity of contacts made with a first group of identified customers and decreasing a quantity of contacts made with a second group of identified customers.

However Bell discloses a method for testing, in the market place, several ideas at the same time on different subgroups, measuring the results from each test on each group then rolling out the best idea to the whole group later (see page 2-3). At page 3, 7<sup>th</sup> paragraph, Bell further teaches modifying calls frequency (decreasing calls frequency from one week to 4 weeks apart) and measuring the effect of such change ("helped"), (inherently using data covering two periods of the same length).

It would have been obvious to one skilled in the art at the time the invention was made to add the Bell MVT test and measure technique, as applied to call frequencies, to the prioritized list - based on call frequency - system of Roseman/Anonymous efficiently and quickly to test and measure the marketplace effect of several call frequencies (different ideas). The efficiency advantage of the MVT method is taught by Bell.

As to claim 4 and its parallels, testing both increasing and decreasing frequencies at the same time on different subgroups, would have been obvious, as test parameters, in the process of looking for an optimum frequency as taught by Roseman ( P. 2 4<sup>th</sup> paragraph), and as stated in the paragraph above, effectively to test and measure the marketplace effect of several ideas (different call frequencies) quickly, as taught by Bell.

As discussed in detail above, the examiner has presented a convincing line of reasoning as to why a skilled in the art would have found claimed invention to have been obvious in light of references' teachings.

Accordingly, the rejection of claims 2-4, 10-12, 16-18, and 20-22 as

unpatentable over Roseman in view of Anonymous and Bell should be sustained.

### **III. Regarding All Rejections of All Claims**

Contrary to argument, Roseman specifically discloses pharmaceutical agents calling on doctors per prioritized lists . Implicitly Roseman involves the "... independently operating salesmen who act according to their biases" because Applicants admit such is a problem with pharmaceutical agents calling on doctors. Roseman discloses post-calls analysis to optimize the call frequency and to determine the best doctors prospects to invest calls time in. Roseman discloses measuring promotion response in response to changing frequencies in a marketing environment of "prioritized list" and possibly of salesmen biases. Thus Roseman recognizes or solves exactly the particular problem with which Applicants are concerned. Contrary to argument, Roseman discloses more than just concepts of ranking potential customers. Applicants clearly do not accord a fair reading to the disclosures in Roseman.

On the other hand, ANONYMOUS discloses measuring promotion response in response to changing frequencies in a subset of a group. One skilled in the art would have added ANONYMOUS to Roseman to allow testing promotion response in response to changing frequencies in a smaller customers sample, for ease of analysis and identification of the optimum frequency and the best prospects, goals enumerated in Roseman.

Bell adds to ROSEMAN/ANONYMOUS the concept of multivariate testing to allow testing in the market place several ideas at the same time on different subgroups then to roll out the best ideas to the whole group later. One skilled in the art would have added Bell's test methodology to ROSEMAN/ANONYMOUS's testing of promotion responses in response to changing call frequencies for the advantage of quick testing as taught by Bell.

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All of Applicants arguments are not convincing as to why the methods of ANONYMOUS and BELL are incompatible with Roseman.

Further, most of the arguments are directed to features not claimed, such as the requirement of biases of the salesmen, of determining” promotional response within *the various subgroups*, *the* requirement of no distortion of the results, or of avoidance of certain effects, or *the* requirement that the method should be not obvious as to which customers get increased or decreased number of calls; the requirement for randomization of customers; the requirement that calling by a telemarketing call center is precluded; or the requirement that the subset of customers be less than a certain size, etc... **The features not claimed yet argued are so numerous that some had to be highlighted in bold above.**

The prior art, in the combination as presented , disclose or at least suggest all aspects of the claimed invention.

Contrary to argument, the Examiner's rejection is not improper "hindsight" analysis, as Roseman clearly discloses the main features of the claimed invention. Further a fair reading of the disclosures of Anonymous and Bell appropriately supply the rest of the claimed limitations.

In summary, the Examiner respectfully submits that a method of determining effectiveness of direct personal promotion efforts in a marketing environment in which representatives make contact with a customer in accordance with a prioritized list is mainly disclosed by the primary reference, Roseman, with the additional limitations fully disclosed by the combinations with ANONYMOUS and Bell, as presented above.

For the above reasons, it is believed that the rejections should be sustained.

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Respectfully submitted,



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November 22, 2005



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